IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 76-1484

JAMES ZURCHER, ET AL.,

Petitioners,

vs.

THE STANFORD DAILY, ET AL.,

Respondents.

No. 76-1600

LOUIS P. BERGNA, ET AL.,

Petitioners,

vs.

THE STANFORD DAILY, ET AL.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF, AMICI CURIAE, OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. AND THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., IN SUPPORT OF THE PETITIONERS.

FRANK CARRINGTON, ESQ.,
WAYNE W. SCHMIDT, ESQ.
Americans for Effective Law Enforcement, Inc.
960 State National Bank,
Evanston, Illinois 60201,

GLEN R. MURPHY, ESQ.,
International Association of Chiefs of Police, Inc.,
11 Firstfield Road,
Gaithersburg, Maryland 20760,
Counsel for Amici Curiae.

Of Counsel:
JAMES P. COSTELLO,
ROBERT SMITH,
JOHN FENNIG,
Americans for Effective Law Enforcement, Inc.,

RICHARD F. MAYER, ESQ.,
International Association of Chiefs of Police, Inc.

Gaithorp-Warren Printing Company, Chicago • Financial 6-6565

TABLE OF CONTENTS.

TABLE OF AUTHORITIES.

Cases.

Statutes.

Other Authorities.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 76-1484.

JAMES ZURCHER, ET AL.,

Petitioners,

vs.

THE STANFORD DAILY, ET AL.,

Respondents.

No. 76-1600.

LOUIS P. BERGNA, ET AL.,

Petitioners,

vs.

THE STANFORD DAILY, ET AL.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF, AMICI CURIAE, OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. AND THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., IN SUPPORT OF THE PETITIONERS.

This brief is filed pursuant to Rule 42 of the Supreme Court of the United States. Consent to file has been received in

writing from Counsel for the petitioners. A copy of this letter of consent has been lodged with the Clerk of the Court. Consent to file this brief has been received verbally, by telephone, from the office of counsel for respondents, his written consent will be lodged with the Clerk as soon as it is received.

INTEREST OF THE AMICI CURIAE

Americans for Effective Law Enforcement, Inc. (AELE) is a national, not-for-profit citizens organization incorporated under the laws of the State of Illinois. As stated in its by-laws the purposes of AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and of police effectiveness to deal with crime.

The International Association of Chiefs of Police, Inc. (IACP) represents over 5,000 chiefs and top executives of police departments and other law enforcement agencies in all 50 states and in 85 foreign countries. The IACP serves the law enforcement profession and the public interest by advancing the art of police service. Its aims are to foster police cooperation and the exchange of information and experience among police administrators throughout the world, and to encourage adherence of all police officers to high professional standards of performance and conduct.

Our interest in this case arises from the fact that, although this Court long ago accorded to law enforcement officers the defense of good faith in civil actions against them, *Pierson* v. *Ray*, 386 U. S. 547 (1967), the award by the lower courts of $47,500 in attorney's fees against officers who were acting in good faith can, for all practical purposes render that defense nugatory. This holding, if affirmed, will have the gravest consequences upon the effectiveness of law enforcement in this country.

ARGUMENT

Amici will confine ourselves, in this brief, to the issue of the award of attorney's fees in the instant case. We wish, however, to express our agreement with, and to associate ourselves with, the arguments made by counsel for the Petitioners and other *amici* in support of the Petitioners, on every question presented in this case.

Our contention, which we will develop briefly for the Court, is that the award of attorney's fees can well be punitive in nature and that this Court should limit the discretion of trial courts to award such fees in cases in which the demonstrable good faith of law enforcement officers has been proven.

1. The Law Enforcement Officers in the Instant Case Were Acting at All Times in Good Faith.

It would be difficult to devise a factual situation in which the good faith of the law enforcement officers involved was more apparent. They were investigating an incident in which nine police officers were injured, some seriously, by demonstrators at the Stanford University Hospital.[1] They had reason to believe and did believe that photographs depicting the commission of the crimes were in the possession of Respondent, The Stanford Daily.

The teaching of this Court, through the years, has been that law enforcement officers seeking evidence should procure a

1. 353 F. Supp. 124, at 126.

search warrant. *Katz* v. *United States*, 389 U. S. 347 (1967); *United States* v. *Chadwick*, ... U. S. ....., 97 S. Ct. 2476, (1977). This was precisely what the petitioners did; they procured a search warrant, duly issued by a magistrate and fair on its face.

The warrant was served, giving rise to the instant litigation. The United States Court of Appeals for the Ninth Circuit, in its opinion in the instant case, recognized the fact that the Petitioners were acting in good faith at least by implication. The Court of Appeals, however, refused to apply the defense of good faith in cases for injunctive or declaratory relief. (550 F. 2d 464 at 465.)

We believe that this holding does not address itself to the issue now presented. *For the purposes of the award of attorney's fees*, we submit that the question should not be controlled by the *form* of relief sought (*e.g.* injunction or declaratory relief as opposed to a claim for civil damages), but whether or not the defendants *were*, in fact, acting in good faith. It is the latter fact which should control the question of whether or not attorney's fees should be assessed.

As noted, the Petitioners followed the dictates of this Court in procuring a search warrant. This fact, standing alone, should be evidence of good faith but there is a much more compelling aspect to the instant case: The District Court *created new law* enabling respondents to prevail in the instant case. The latter element of this case is patent in the record. The question presented in the trial court was whether law enforcement officers, seeking evidence of crime from third parties, should exhaust the *subpoena deuces tecum* route before proceeding with a search warrant. On this point the trial court stated, with candor, that:

> . . . neither the Court nor the parties have come across any case which discusses the problem of when law enforcement agencies must use a *subpoena deuces tecum* rather than a search warrant. (353 F. Supp. 124 at 127.)

If, as the lower court conceded, there was no law on this particular issue, and the Petitioners were following generally established principles of the law of search and seizure by obtaining a search warrant, the conclusion seems inescapable that they were acting in the utmost good faith.

To be sure, the trial court developed a "lesser-intrusion" rule and held that the Petitioners should have procured a subpoena rather than a search warrant; but this holding was completely *after the fact*. The only way in which a lack of good faith could be shown in this case would be to hold the Petitioners liable for not being clairvoyant and, thus, unable to predict that Judge Peckham would create, *de novo*, his subpoena-rather-than-search-warrant rule.

In sum, the Petitioners acted in accordance with all *existing* standards of the law of search and seizure at the time of the incident in question. Every concept of fundamental fairness to law enforcement officers involved in the day-to-day, difficult and often dangerous task of enforcing the criminal law would be rendered ineffective if their actions must be retroactively condemned by the application of *newly-created* law.

2. The "Four Corners" Rule for Determining Probable Cause in Criminal Cases Should Not Be Applied to Civil Cases When the Defense of Good Faith Is in Issue.

If further evidence of the good faith of the officers involved in the instant case were needed, it is provided by the fact that they actually had ample probable cause to believe that the photographs—the evidence sought—would be destroyed. Concededly, such evidence was not presented within the "four corners" of the search warrant, and, as a result, the trial court refused to consider such evidence. This, we submit, was in error. The trial court intimated that the use of a subpoena might well have been impracticable:

> Nor should it matter that the law enforcement agencies did in fact go to the magistrate, *or that probable cause did*

> *in fact exist to believe that a subpoena was impractical* unless such probable cause was established by sworn statements to the magistrate. 353 F. Supp. at 132. (Emphasis supplied.)

Yet, it applied the "four corners" rule in order to deny to the use of Petitioners this most compelling evidence of good faith.

Probable cause as to the impractability of a subpoena was supplied by the affidavit regarding summary judgment of deputy district attorney Craig Brown, filed in the record in the instant case on July 7, 1972, who recited the belief that the photographs sought in the instant case might be concealed or destroyed, because:

> A prior "deletion" of evidence was believed to have taken place in 1969. [Brown Affidavit, ¶ 3, p. 2.]
>
> Prior experience with the plaintiff newspaper indicated that negatives and photographs might be "lost" [¶ 4, p. 3] or "stolen" [¶ 5, pp. 3-4] or deliberately destroyed or removed [¶ 6, p. 4].

The trial court, however, refused to consider this vital evidence in the *civil* case, basing its rationale on the "four corners" rule that all evidence supporting the issuance of a search warrant in criminal cases must be contained in the "four corners" of the warrant affidavit, *i.e.*, that it be in writing and sworn to before the magistrate. *U. S.* v. *Anderson*, 453 F. 2d 174 (9th Cir. 1971).

While we do not quarrel with the application of the "four corners" rule insofar as the actual issuance of a search warrant in criminal cases is concerned, we believe that the lower court erroneously applied that rule to exclude evidence vital to the position of the defendants in a civil case. *Anderson* relied on Rule 41(c) and ten federal cases cited at footnote 3 at 453 F. 2d 177. We hasten to point out, that nine of these cases involved criminal prosecutions where the government was the "plaintiff." The tenth case dealt with the return of property illegally seized.

The "four corners" rule is applied in criminal cases to search warrants which are issued after an *ex parte* hearing by a magistrate, in which the government *unilaterally* presents its evidence. There are important policy reasons for requiring the government to produce all of its evidence in support of a finding of probable cause, in writing, to a magistrate in a criminal case. This is not the case in this proceeding, which is a civil action in which both parties are represented by counsel and all of the material facts relevant to the conduct of the defendants are in issue, and are generally the subject of civil discovery. There is simply no reason to apply the "four corners" doctrine in this case. To do so will result in a suppression of relevant evidence which is favorable to the defendant, and which evidence the plaintiffs will have every opportunity to challenge in the civil proceeding.

The lower court held, in effect, that the subpoena process was the only proper route for the police to take absent a showing of probable cause to believe that such process was impracticable; yet, when, in the civil case, the defendants tendered such a showing the court rejected it based on the "four corners" doctrine.

This, we believe, confuses the exclusionary rule of *Mapp* v. *Ohio*, 367 U. S. 643 (1961), which applies to the suppression of evidence in criminal cases, with the exclusion of evidence which is absolutely necessary to the proof of the defendants' case in the instant civil action.

Had the plaintiffs in this action been criminal defendants seeking to suppress evidence illegally seized from them, then the "four corners" doctrine of the exclusionary rule would apply. It is another matter entirely, to extend this doctrine to relevant evidence in a civil case, where the government or a government agent is the defendant, and no penalty or forfeiture is sought against the party in possession of the property. The effect of this ruling on law enforcement would be drastic. Consider the following possible consequences of such a rule:

> An officer who has probable cause to effect a warrantless arrest, obtains and serves an arrest warrant issued on insufficiently stated grounds. The officer would be unable to show in a later civil case the existance of probable cause in a suit against him which alleged false arrest.
>
> An officer has probable cause to search an automobile, in a case in which, ordinarily, no warrant would be needed. He nevertheless procures a warrant, and in his haste, omits some of the necessary facts supportive of probable cause. He would not be able to show the underlying grounds justifying the search, and could be held liable for an "illegal" search.

Amici believe that it would be a grievous error to extend the "four corners" doctrine to civil cases in which a police officer is the defendant, thus enabling a civil plaintiff to defeat the search for truth and to avoid a trial on the merits, in cases in which the issue is the officer's liability.

Indeed, such a ruling would defeat the preference for the warrant process, enunciated by this Court in *United States* v. *Ventresca*, 380 U. S. 102 (1965), for it would penalize the officer who secures a warrant by restricting any defenses he might have in a civil action solely to those facts which he has set down on paper.

We suggest that the language of the U. S. Supreme Court in *United States* v. *Calandra*, 414 U. S. 338 (1974), is applicable. In that case the lower courts had found that an affidavit in support of a search warrant was deficient, and that the party in possession of the records seized pursuant to the warrant was (a) entitled to their return, and (b) could invoke the exclusionary rule before a grand jury convened to investigate related matters (loansharking). In its 6-3 decision, the Supreme Court reversed, stating:

> Thus, standing to invoke the exclusionary rule has been confined to situations where the Government seeks to use such evidence *to incriminate* the victim of the unlawful search. *Brown* v. *United States*, 441 U. S. 223, 93 S. Ct.

> 1565, 36 L. Ed. 2d 208 (1973); *Alderman* v. *United States*, 394 U. S. 165, 89 S. Ct. 961, 22 L. Ed. 2d 176 (1969); *Wong Sun* v. *United States*, supra, *Jones* v. *United States*, 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed.2d 697 (1960). This standing rule is premised on a recognition that the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of *a criminal sanction* on the victim of the search. 414 U. S. 348. (Emphasis supplied.)

The fact that there was indeed probable cause to believe that the issuance of a *subpoena deuces tecum* was impracticable in the instant civil case is a major foundation of the defense in this case. Yet, the lower court applied a rule of suppression of evidence in criminal cases to this essential showing in a civil case.

We reiterate that, in a civil case, the court should consider all of the evidence which is relevant to the cause at issue. It should not superimpose doctrines of suppression of evidence, which have heretofore been confined to criminal actions to civil cases in which the evidence is absolutely essential to the defendant's case in general and in particular to the defense of good faith.

At any rate, we believe that the question of the good faith of the Petitioners in the instant case, must be resolved in favor of the Petitioners. If this be true, should attorney's fees be assessed for good faith actions in such cases?

3. The Defense of Good Faith, if Perfected, Should Bar the Award of Attorney's Fees.

We concede, at the outset, that the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. A. 1988 provides for the award of attorney's fees, at the discretion of the trial court, in civil rights cases. Our argument is, however, that an award of attorney's fees should not be made in cases in which the defendants were acting in good faith.

This argument is premised upon the very practical fact that *any* such award against a law enforcement officer has a punitive effect on him, even though no such punitive effect would be justifiable, or even intended. It would be ironic indeed if the state of the law should develop to the point at which we say to law enforcement officers: "You acted in complete good faith. Therefore we will not penalize you with civil damages; but of course you must pay anyway, because we assess 'X' amount in attorney's fees against you."

We stressed at the outset of this brief that we were primarily concerned with the question of *fundamental fairness* to law enforcement officers. Perhaps an analogy is apt at this point in order to develop the question of fundamental fairness.

The Federal Civil Rights Act under which the instant case was brought, 42 U. S. C. A. 1983, was enacted to redress violations of civil rights. The Act, by its terms, gives a cause of action against police officers who violate civil rights; and this Court held that the provisions of the Act were applicable to law enforcement officers in *Monroe* v. *Pape*, 365 U. S. 167 (1961).

The application of the Act to the activities of law enforcement officers *could* have been made absolute: the officer acts at his peril every time that he acts. However, this Court, recognizing the difficulty of "on the street" law enforcement, engrafted the defense of good faith onto the issue of potential liability of law enforcement officers in the case of *Pierson* v. *Ray*, 386 U. S. 547 (1967), stating:

> A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted for damages if he does. 386 U. S. 554 at 555.

The defense of good faith has developed to the point now where: 1) if an officer subjectively believes that he had probable cause to make an arrest or search; *and* 2) if, by the objective

determination of the trier of fact, this good faith belief was reasonable; then the officer is entitled to prevail in a civil action. *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F. 2d 339 (2nd Cir. 1972); *Hill* v. *Rowland*, 474 F. 2d 1374 (4th Cir. 1973); *Rodriguez* v. *Jones*, 473 F. 2d 599 (5th Cir. 1973); *Tristis* v. *Backer*, 501 F. 2d 1021 (7th Cir. 1974); *Brubaker* v. *King*, 505 F. 2d 534 (7th Cir. 1974).

The doctrine of the good faith defense developed in order to prevent the policeman from being held liable for his good faith decisions, made under the exigencies of law enforcement on the street, even if such decisions might be ultimately determined to be mistaken. Compensatory damages can not be awarded if good faith has been properly pleaded and proven.

We submit that the award of attorney's fees for good faith police action, later held to be violative of Constitutional rights, could render the good faith defense nugatory.[2]

In those states and municipalities which do not indemnify officers,[3] the award of attorney's fees penalizes the officer directly. It says to the officer in effect, that: "Your good faith precludes the award of civil damages, but you must, nevertheless, pay attorney's fees."

---

2. In the brief for Petitioner Bergna and in the brief, *amici curiae*, filed in support of the Petitioners in the instant case by the states of Alabama, Alaska, California, Florida, Georgia, Idaho, Illinois, Indiana, Maryland, Massachusetts, Mississippi, Nebraska, New Mexico, New York, Oregon, Pennsylvania and Texas (hereafter: Brief, *amici curiae*, of Alabama, *et al.*), the issue of whether the award of attorney's fees against a *District Attorney* violates this Court's holding in *Imbler* v. *Pachtman*, 424 U. S. 409 (1976) has been completely developed. Consequently, we will confine our argument to the impact of the award of attorney's fees upon the defense of good faith as it applies to law enforcement officers.

3. For a listing of those states which do and do not indemnify public employees see: R. Crane and G. Roberts, *Legal Representation and Financial Indemnification of State Employees: A Study* (January, 1977) (American Correctional Association), cited as Appendix A of the Brief, *amici curiae*, of Alabama *et al.*, *supra* N. 3.

The financial security of most police officers is precarious at best. To tell an officer in a non-idemnification state or municipality that he should not be concerned because the award comes out of his "attorney's fees" pocket rather than his "compensatory damages" pocket is purely a matter of semantics. He is still paying, out-of-pocket, for his good faith efforts to enforce the law.

In the instant case we concede, that the State of California, by statute, will indemnify the Petitioners for the award of attorney's fees should Respondents prevail. On paper, such a state of affairs seems equitable. The plaintiffs recover their costs, the defendants are not out of pocket, and a faceless bureaucracy pays the attorney fees. This disregards reality, however.

The current financial situation of almost every government entity leaves no margin for error for large awards against the employees of that municipality. The total award in the instant case was $47,500. No law enforcement officer, be he the chief of police or a patrolman, should be saddled with the burden, in his personnel record, that his actions cost his employers all or part of such an amount of money.

In theory, of course, the award of attorney's fees against an officer, even though he was acting in good faith, is not punitive but rather a shifting of the burden of litigation. To cost-conscious county administrators and city fathers, however, this distinction may be over-subtle. The personal integrity of law enforcement officers against whom exorbitant amounts of attorney's fees have been levied, and their chances of advancement and promotion will, we submit, in many, if not most cases, be adversely affected.

The award of attorney's fees to the "prevailing party" in cases in which officers were acting in good faith will, penalize as much as an award of damages.

We are not arguing that, when in a given case, the defendant law enforcement officials are found to be liable for damages be-

cause they were *not* acting in good faith attorney's fees should not be assessed under the law. We argue only that when the defense of good faith, which would *preclude* the award of civil damages has been perfected, then the award of attorney's fees should be denied; for, in reality, it has the same effect as a damages award.

We do not quarrel with the intent of the Federal Civil Rights Attorney's Fees Act of 1976. When civil rights are vindicated it strengthens our legal system. But when a law enforcement officer acts in the good faith which would preclude an award of compensatory damages then it is fundamentally unfair to penalize him with an award of attorney's fees.

And, certainly, if the award of attorney's fees is unfair in good faith cases, then the *retroactive* award of attorney's fees under a law enacted *after* the conduct complained of took place only serves to compound this unfairness to the extreme.

We urge this Court to apply to the issue of attorney's fees the same concept of fundamental fairness to law enforcement officers which is inherent in the defense of good faith, upheld by this Court in *Pierson* v. *Ray, supra*. Congress left open the question of whether liability under the Federal Civil Rights Act (42 U. S. C. A. 1983) should be absolute or qualified. This Court resolved the question by qualifying liability with the defense of good faith. Likewise, Congress, left the decision as to awards of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976 to the discretion of the court. This Court, we submit, should limit this discretion *only* to cases in which law enforcement officers were acting in bad faith.

CONCLUSION

The law enforcement officers in this case acted in the utmost good faith at all times. The sole reason that the "prevailing party" prevailed was because the trial court created law, *de novo*. The fact that the defense of good faith may not be applicable to cases

in which declaratory or injunctive relief is sought has no bearing upon the question of whether attorney's fees should be awarded.

The award of attorney's fees against the good faith defendant works punitively and unfairly. Particularly so, when, in the instant case, the law providing for the award was applied retroactively. We urge this Court to reverse the judgment of the U. S. Court of Appeals for the Ninth Circuit.

Respectfully submitted,

FRANK CARRINGTON, ESQ.,
WAYNE W. SCHMIDT, ESQ.
Americans for Effective Law Enforcement, Inc.,
960 State National Bank,
Evanston, Illinois 60201,

GLEN R. MURPHY, ESQ.,
International Association of Chiefs of Police, Inc.,
11 Firstfield Road.,
Gaithersburg, Maryland 20760,
Counsel for Amici Curiae.

Of Counsel:
JAMES P. COSTELLO,
ROBERT SMITH,
JOHN FENNIG,
Americans for Effective Law Enforcement, Inc.,

RICHARD F. MAYER, ESQ.,
International Association of Chiefs of Police, Inc.